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February 20, 2007

By Electronic Filing (ECFS)

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Ave, N.E
Suite 110
Washington, DC 20002

Re: *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 CC Docket 96-128*

Reply of the Payphone Association of Ohio to Comments Filed by Each of AT&T, Inc.'s and the Verizon Telephone Companies and the Public Utilities Commission of Ohio

Dear Ms. Dortch:

Please find attached herewith the electronically filed and consolidated *Reply of the Payphone Association of Ohio to Comments Filed by Each of AT&T, Inc.'s and the Verizon Telephone Companies, and the Public Utilities Commission of Ohio* in the above referenced docket.

Very truly yours,
Technology Law Group, L.L.C.

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Greg Taylor
Counsel to the Payphone Association of Ohio

NSE/hs
Encs.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket 96-128
Reclassification and Compensation Provisions	)	
of the Telecommunications Act of 1996	)	

Reply of the Payphone Association of Ohio to Comments Filed by Each of AT&T, Inc.'s and the Verizon Telephone Companies and the Public Utilities Commission of Ohio

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EXECUTIVE SUMMARY

Notwithstanding others' efforts to cloud issues presented in this matter, the facts and legal issues presented to the FCC remain simple and straight-forward. Congress, through its enactment of the Telecommunications Act of 1996 (the "Act"), recognized the need to intervene in the industry to create a level playing field in the payphone industry. As part of its efforts to create this level playing field, Congress expressly prohibited in Section 276 of the Act, all Bell operating companies providing payphone service (which includes AT&T) from operating in a manner so as to prefer or discriminate in favor of its payphone service. To accomplish this, Bell companies were required, both by the express language and Section 276 and by FCC orders, to provide payphone service rates that were cost based.

In this context, the FCC need only consider several facts in order to reach the proper conclusion that AT&T must refund to PAO for monies it collected in excess of what is allowed pursuant to Section 276. The indisputable facts are: (i) Section 276 of the Act requires rates to be cost based as of January 15, 1997; (ii) In exchange for the ability immediately to collect dial around compensation from the payphone service providers, AT&T expressly and unconditionally promised the FCC and PUCO to refund payphone service providers any overcharges back April 15, 1997, in the event its rates were later determined to exceed rates allowed pursuant to Section 276; (iii) AT&T's rates were not cost based, as determined by PUCO in its September 25, 1997 Order and Entry; (iv) PAO overpaid AT&T for payphone services; and (v) PUCO has refused to order AT&T to refund the overcharges on the basis that the issue was beyond the scope of its proceeding. Every other issue, defense, excuse or claim presented in this matter by AT&T and PUCO is superfluous noise, offered with the objective to distract from these dispositive facts.

PAO's motion for declaratory ruling is properly before the FCC, and none of the barriers suggested by either of AT&T or PUCO are factually or legally sustainable. Pursuant to 47 CFR 1.2, the FCC possesses the authority to issue declaratory rulings to terminate controversy and remove uncertainty and the PAO Petition, like those of many other payphone associations seeks precisely that relief.

PAO's motion is tendered for the FCC's initial consideration and not, as argued by AT&T and PUCO, as an impermissible collateral attack on a prior judgment. Indeed, by PUCO's own admission and as discussed in PAO's original Motion and this Reply, PUCO determined the refund question to be outside the scope of its proceedings. Further, the Supreme Court of Ohio upheld the PUCO's decision to not address the refund issue. Consequently, there has never been a hearing on the merits together with the submission of evidence of the matter of refunds. Thus, the suggestion from AT&T and PUCO that the doctrine of *res judicata* bars PAO from bringing this matter before the FCC is wrong as a matter of fact and law.

With respect to the issue of preemption, PAO does not believe that it is necessary for the FCC to preempt in order to grant the relief requested. The PUCO determined AT&T's rates did not conform to the statutory requirements as set forth in Section 276; PAO does not disagree with or challenge that finding. The PUCO also determined the refund question to be outside the scope of its proceedings and thus did not address that issue. In this context, PAO believes that the FCC has the inherit authority to order refunds and that it does not need to preempt to do so.

However, to the extent that FCC concludes that it must preempt any aspect of the PUCO or Supreme Court orders in order to effectuate the relief requested herein, PAO specifically requests that it do so, and believes that it has the clear authority to do so. The Act establishes a clear national policy favoring cost-based rates and full competition in providing payphone

services and the absolute statutory authority for the FCC's preemption state regulatory schemes or other requirements which fail to implement or which conflict with the federal mandate. Indeed, Section 276(c) could not be more explicit in mandating preemption in the case of a conflict between the states and the FCC: "to the extent that any state requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall pre-empt such state requirements." 47 U.S.C. § 276. That is, unlike many circumstances where pre-emption is allowed but reluctantly implemented, in this instance, preemption is not optional; the FCC is required to preempt wherein finds a state's requirements are inconsistent with the federal mandate.

AT&T and PUCO each argue the applicability of the filed rate doctrine; however, it cannot be applied in this matter. The higher rates charged by SBC from April 15, 1997 forward were never established as the lawful rate(s) under Section 276, and thus never obtained the status of lawful rates that could be the basis of a claim under the filed rate doctrine. AT&T and PUCO also argue AT&T's rates were always lawful and thus no refund obligation. This argument is predicated on the allegation AT&T's 1985 tariff was approved by PUCO and, therefore, reflected lawful rates and that those rates were then filed with PUCO in response to the FCC's Order requiring the submission of cost-based rates under Section 276. With respect to the lawfulness of the 1985 rates, this argument completely misses the point. Indeed, even if those rates were lawful when filed, the standard for review in 1985, before cost-based rates were required, was dramatically different from the Section 276 standard. Thus, at best, all that can be said about those rates is that they were lawful under the then-applicable costing regime applied by PUCO in 1985.

Based on PUCO downward adjustment order to AT&T, we know with absolute certainty those same rates were never consistent with Section 276 until the downward adjustment order. Accordingly, even if the 1985 tariffed rates were lawful as a matter of the 1985 Ohio costing regime, that is not now, nor was it ever the standard relevant to the determination of whether refunds are required. Refunds are required because, contrary to AT&T's self-serving certification, its 1985 tariffed rates were never consistent with the New Services Test Standard, which is the sole determinant of the obligation to make refunds.

The FCC also has made clear RBOCs are ineligible to collect dial-around compensation until their rates meet this cost standard. However, the FCC granted a waiver of this eligibility requirement on the express condition each of the RBOCs would make full refunds of any amounts collected in excess of the cost-based rate as subsequently determined by the state regulatory authority. Moreover, AT&T, both as a part of the RBOC coalition and on its own, specifically and expressly promised respectively to the FCC and to the PUCO, that it would make such refunds without regard to any available defenses, including the filed rate doctrine. Notwithstanding these orders and the independent obligation created by AT&T's promises, for many years, AT&T has charged payphone rates well in excess of prescribed levels and it has steadfastly refused to make any refund for those overcharges.

Section 503 of the Act sets forth the circumstances in which the Commission has the authority to impose monetary forfeiture penalties. Not surprisingly, one such circumstance is where a party has "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation or order issued by the Commission . . . ." 47 U.S.C. § 503.

The FCC also has the right to apply remedies other than monetary forfeitures. For example, where, as here, the party's violation includes the breach of an agreement with the FCC,

the FCC has the right to, and in this case most certainly must require that party to disgorge all monetary gains obtained through violation of that agreement. A failure to impose this remedy would have the perverse effect of continuing to reward AT&T both for its failure to charge cost-based rates, as well as for its willful and blatant breach of its refund agreement.

AT&T's refusal to make refunds is not only in direct violation of its express agreement and the FCC's express mandate that it do so, it is plainly anticompetitive. Indeed, not only has AT&T materially overcharged the private payphone providers with which it competes—causing them the very competitive harm that Congress sought to prevent—it has retained those revenues for nearly a decade while simultaneously collecting millions in dial-around revenues. The FCC is obligated by law to consider the competitive effect of its conduct as a part of its public interest review, in addition to any specific statutory or policy considerations.

Not only does PAO have the law on its side, it is also right as a matter of simple justice. By overcharging PAO, and refusing to make refunds, AT&T not only derived substantial excess revenue in payphone line charges, thereby filling its coffers and economically crippling its competitors, it specifically and intentionally breached its commitment to the FCC voluntarily to act in a lawful manner and denied PAO the benefits to which it is lawfully entitled. Such conduct should not be rewarded.

By any measure, AT&T is required as a matter of law to make immediate refund of all amounts collected since April 1997 from PAO's members and to make an award of reparation, consistent with federal law. The PAO respectfully requests that the FCC declare AT&T's obligation to do so.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:	)	
	)	
Implementation of the Pay Telephone	)	
Reclassification and Compensation Provisions	)	
of the Telecommunications Act of 1996	)	
	)	CC Docket 96-128
Petition of the Payphone Association of Ohio	)	
To Pre-empt the Actions of the State of Ohio	)	
Refusing to Implement the FCC's Payphone	)	
Orders, Including the Refund of Overcharges	)	
to Payphone Providers in Ohio, and For a	)	
Declaratory Ruling	)	

CONSOLIDATED REPLY OF THE PAYPHONE ASSOCIATION OF OHIO TO THE JOINT COMMENTS FILED BY AT&T AND THE VERIZON TELEPHONE COMPANIES AND TO THE SEPARATE COMMENTS FILED BY THE PUBLIC UTILITIES COMMISSION OF OHIO

The Payphone Association of Ohio ("PAO") by and through its undersigned counsel, hereby files its consolidated reply to the comments filed by AT&T Inc. and the Verizon Telephone Companies' ("AT&T") and to the separate comments filed by the Public Utilities Commission of Ohio ("PUCO") in the above captioned matter.

INTRODUCTION

1. The PAO is a not-for-profit corporation organized under the laws of the State of Ohio and is comprised of independent payphone providers that purchase from AT&T the local exchange services required to provide payphone services to their customers. PAO submits these Reply Comments in further support of its Petition to Preempt and for Declaratory Ruling and order: (i) establishing the rights of the members of the PAO to the refund of overcharges for amounts collected in excess of lawful payphone rates back through to April 15, 1997; (ii) pre-

empting, to the extent required to fully implement federal policy, the State of Ohio's refusal to implement the orders of the Commission in CC Docket 96-128, requiring the assessment of cost-based rates to payphone providers and the refund of charges in excess of such rates; and (iii) requiring AT&T immediately to disgorge and return all dial-around compensation collected pursuant to Section 276 and the Federal Communications Commission's ("FCC") rules and orders promulgated thereunder.

2. Although the telephone companies in general, and AT&T in particular, have attempted to obfuscate the issue by interjecting a wide range of extraneous facts and legal arguments, the facts and legal arguments material to the FCC's action in this matter are simple and straightforward.

3. With respect to the facts at issue, first, as explained below and contrary to certain misrepresentations of the record by PUCO and AT&T, it is undisputable that PUCO found that AT&T's rates were developed in a manner inconsistent with the required costing standard and that its rates were in excess of allowable cost. Second, it is also undisputable the PUCO did not take evidence, let alone reach any conclusion, as to AT&T's legal obligation to pay refunds for amounts collected in excess of the proper cost-based rate. Third, contrary to certain misrepresentations of the record by PUCO and AT&T, the Ohio Supreme Court did not overturn or otherwise upset either of these factual determinations.

4. With respect to the matters of law, the necessary conclusions are also clear and unambiguous. First, there is no question that the PAO Petition is properly before the FCC or that the relief it seeks is consistent with the relief available through a petition for declaratory ruling. Second, although preemption is not required to grant the relief requested by the PAO, the FCC clearly has the legal authority and, indeed, the obligation, to preempt the rulings of the PUCO as

necessary to ensure that PAO receives the relief to which it is entitled under Section 276 of the Telecommunications Act. Third, there is no legal basis, either in the doctrine of *res judicata* or in the filed rate doctrine, which precludes the FCC from ordering AT&T to make refunds of all amounts collected in payphone charges in excess of the lawful rate back to April 15, 1997. Finally, as set forth in the PAO Petition, in reaching its decision in this matter, the FCC is required to consider and specifically to address the anticompetitive effect of AT&T's collection of excessive payphone charges and to order the disgorgement of all dial around charges collected prior to date on which refunds are made to the PAO.

ARGUMENT

A. PAO's Petition Is Properly Before the Commission

5. AT&T argues that PAO's Petition to the Commission for a declaratory ruling is an improper. collateral attack on the decisions of each of the PUCO and the Ohio Supreme Court, and that the Commission should respect those decisions as there was a full hearing and a complete record on the merits. Essentially, AT&T argues PAO had its opportunity and lost and that it should not get a second bite at the apple. *See* Comments of AT&T at 8.

6. PAO's Petition cannot properly be characterized as a collateral attack of a final judgment because, as discussed below, PUCO expressly did not rule on any of the issues raised in the Petition, and the Supreme Court of Ohio determined PUCO did not act outside the scope of its authority. As a result, the FCC's consideration of the refund issue in this proceeding will be the first substantive consideration of this issue at any level. Accordingly, PAO's motion for declaratory judgment is entirely appropriate.

7. AT&T contends further that PAO's petition is improper in that it asks the FCC to order AT&T to refund overcharges to PAO only (*i.e.*, it fails to seek relief for all PSPs).

Specifically, AT&T relies on Comments filed by BellSouth (now AT&T), in an identical dispute, wherein BellSouth was also attempting to defend against its unlawful over-collection of payphone service rates. *See* Comments of AT&T at Page 8. In those Comments, AT&T argued that a motion for declaratory ruling was inappropriate because the motion only sought to address the petitioner's specific grievance, and Commission action would not clear ambiguity in other controversies. AT&T also suggested in those Comments that a declaratory ruling from the Commission would actually make matters worse, not better, since:

> the question of an appropriate remedy in an individual state necessarily depends on the circumstances in that state. Resolution of the question presented by IPTA's petition [i.e., whether BellSouth should refund money it collected in excess of lawful rates and its express promises to refund said monies] therefore would not contribute substantially to resolving any uncertainty that might exist.

See Comments of AT&T on IPTA Petition at 12-15.

8. We agree with the Reply Comments of the Illinois Public Telephone Association ("IPTA") in that case, to wit:

> contrary to the RBOCs' and ICC's claim that the [IPTA's] Petition is specific and unique to Illinois, the fundamental ruling requested is for the Commission to address what remedies are available to PSPs generally for violations to the Commission's Payphone Orders. To claim that there is no controversy or uncertainty among the states regarding this issue defies credibility.

Reply Comments of Illinois Public Telephone Association at 5. (September 8, 2004).

9. Indeed, even the most cursory review of the comments filed by the APCC, as the representative of many payphone service providers, and the individual payphone associations across the country, reveals the same legal issues in every instance; that is, first—whether Section 276 and the Commission's orders require the payment of refund where a state has concluded a rate was in excess of cost and, if so, what is the effective date of the refund, and, second—did the coalition letter create an independent and legally binding obligation to do so? The PAO Petition,

like those of the APCC and the other payphone associations, seek "to bring some greater measure of certainty to the industry [and] to enable this Commission and the states…to address the numerous other unresolved issues." *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order*, WC Dkt. No. 03-211, FCC 04-267 ¶14 n.46. In so doing, these Petitions reflect *precisely* the proper purpose the FCC has set forth for declaratory relief. *See* Comments of the American Public Communications Council on the Florida Public Telecommunications Association's Petition for Declaratory Ruling at Page 4 (February 28, 2006), *citing Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order*, WC Dkt. No. 03-211, FCC 04-267 ¶14 n.46.

10. By acting on the PAO Petition, the FCC will remove uncertainly and controversy both for the PAO, but also for payphone associations and telephone companies across the country. It is this simple truth—that a fair resolution of the refund issue will obligate AT&T and its brethren across the country to pay the refunds they owe, and promised to pay—rather than the cynical assertion that such a decision would be of no value—that drives AT&T's multi-faceted and cynical effort to avoid a comprehensive review of the issue by the FCC.

B. <u>The Preemption Issue</u>

1. <u>Preemption Is Not Required To Grant The Requested Relief</u>

11. AT&T and PUCO have each questioned whether the FCC has the authority to preempt the "decisions" of the PUCO and the Ohio Supreme Court. However, while preemption is certainly permitted in this instance, and PAO so requests to the extent that the FCC determines it is required, the FCC does not need to preempt in order to grant the relief PAO requests.

12. Several rational underlie this conclusion. In its orders, the PUCO essentially decided two things. First, it held AT&T's rates exceeded the statutory requirements of §276, and consequently, ordered "the rates should be adjusted downward" to the lawful levels required by the New Services Test. *See* Comments of Public Utilities Commission of Ohio at 12. Second, the PUCO held that the issue of refunds was outside the scope of its authority. For the limited purpose of determining whether preemption is required, PAO accepts each of the PUCO's decisions. However, to the extent that these decision remain in place they leave open the question of how to address AT&T's overcharges.

13. As we will address in more detail below, the FCC may appropriately order refunds pursuant to the Communications Act—including the FCC's authority to require the payment of retroactive refunds under Section 204(a) where, as here, the rate being charged is unlawful as a matter of federal law and policy. Specifically, under Section 204(a), the FCC may order a "refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified." 47 USC 204(a).[1] The FCC also has the obligation to order refunds under Section 276 to effectuate the clear and unambiguous requirement that "any Bell operating company that provides payphone service shall not prefer or discriminate in favor of its payphone service." 47 USC 276. This obligation is sustained by the FCC's statutory obligations, under Sections 201 and 202, respectively, to ensure "just and reasonable" and nondiscriminatory rates.

14. By its own admission, PUCO has found that AT&T's rates exceeded lawfully allowed rates under to Section 276, as set forth in Section 276 and clarified in the FCC's

[1] Prospective relief is also expressly permitted under Section 205. 47 USC 205.

Wisconsin Order.[2] *See* Comments of the Public Utilities Commission of Ohio at 6. Because PUCO failed substantively to consider the issue of refunds, this matter is left to the FCC to address in this proceeding.

15. Even if FCC did not have the express statutory obligation and authority to order refunds, there is a second, entirely independent basis, on which AT&T is obligated do so. Specifically, the RBOC coalition, which included AT&T, expressly promised the FCC, on two separate occasions and documents , and it promised the PUCO, on a third independent occasion and document, that: (i) it would reimburse the payphone service providers for charges in excess of the lawful rate, and (ii) it would do so back through April 15, 1997. In the first such document, the coalition stated that:

> . .the voluntary reimbursement mechanism discussed above [i.e., "to **provide a credit or other compensation to purchasers back to April 15, 1997**."] – which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up – will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

Kellogg Letter (April 10, 1997) at p. 2 (Emphasis added). The following day, April 11, 1997, coalition counsel sent a second letter to the FCC. In this letter, the coalition again assures the FCC of its intention to make full refunds, and to do so back to April 15, 1997.

> . . . where new or revised tariffs are required and the new tariffs rates are lower than the existing ones, [the coalition] will undertake (consistent with state requirements) to **reimburse or provide a credit back to April 15, 1997**, to those purchasing the services under the existing tariffs.

Kellogg Letter (April 10, 1997) at p. 1 (Emphasis added).

16. In response, to the clear commitment reflected in the language of each of these letters, AT&T has concocted the claim that the refund period, if it existed at all, was limited to

[2] PUCO argues that the Wisconsin Order amended the costing regime established by the FCC. This is not correct. In fact, the Wisconsin Order merely clarified the existing costing regime; it neither replace it nor did it move the effective date forward from the date required under Section 276.

the 45 day waiver period. This *post hoc* argument cannot withstand scrutiny. As an initial matter, as shown above, the language committing to refund back to April 15, 1997 is absolute. No language can be found that limits the scope or time period applicable to this commitment.

17. Moreover, AT&T made this same absolute and express commitment in a letter to the PUCO. That letter states:

> [AT&T] has agreed that if state commissions, upon reviewing these new materials concerning the "new services test," require any tariff rates to be revised downward, [AT&T] will make **refunds of those rates back through April 15, 1997**."

Cyvas Letter at Pgs. 1-2 (Emphasis added). Thus, even if AT&T were somehow able to cast doubt on the meaning of the coalition letters to the FCC, or to limit the duration of the refund commitment to forty-five days (which it cannot), it cannot make—and had not made—these claims as to the commitment reflected in its letter to PUCO. This is true for several reasons. First, as noted, the Cyvas letter, like the coalition letters, clearly established AT&T's commitment and obligation to make refunds back through April 15, 1997. Second, the Cyvas letter does not contain any statement, or even the suggestion, that AT&T's refund obligation would be limited to the waiver period.

18. Third, and most critically, ***inasmuch as AT&T's commitment to the PUCO was set forth in a letter covering its submission of cost data in support of its payphone tariffs, it puts the lie to the creative, after-the-fact argument, made by other RBOCs, that since they did not make the required tariff filing during the forty-five day grace period, they never "took advantage" of the waiver, and, thus, the refund obligation never came into existence***. Indeed, by associating its refund commitment with the filing of its cost data ***during the forty-five day grace period***, and by expressly tying its refund commitment to the refund obligations of the FCC's April 15, 1997 Order, SBC's May 16, 1997, letter specifically and directly links its right to collect dial-around

compensation in Ohio to its refund commitment back to April 15. 1997. Thus, even if the RBOC's disingenuous attempt to limit its refund obligation is accepted in other jurisdictions, it cannot rescue SBC here as its ***commitment was made during the forty-five day grace period*** and it is expressly tied to the refund obligations of the FCC's April 15, 1997 Order.[3]

19. AT&T also erroneously suggests "PAO failed to introduce th[e] letters properly into the record of the Ohio proceeding." *See* Comments of AT&T, at 11. In fact, as AT&T recognizes, the failure to admit the letters was not because "PAO failed properly to introduce them," but rather "because their introduction as evidence violated earlier orders in which PUCO held refunds for any period of time prior to the imposition of interim rates were not within the scope of the proceedings." 849 N.E.2d 453, 458 (Ohio 2006). Not only does this conclusion put the lie, again, to AT&T's suggestion regarding the introduction of the letters, it further demonstrates PUCO did not address this key issue below and thus, that neither of the doctrines of *res judicata* nor preemption can be properly applied.

20. In this context, AT&T's argument that it has no obligation to refund overcharges is untenable. AT&T's intrastate tariffs containing the rates deemed lawful by PUCO became effective in Ohio, at the earliest, on March 4, 2004. *See* Opinion and Order of the Public Utilities Commission of Ohio, Case No. 96-1310-TP-COI (March 4, 2004). Thus, according to the express and unambiguous language of the Waiver Order, AT&T was required to reimburse PAO an amount equal to the difference between the amount charged for payphone services under the existing rates and the new, lower rates, from at least March 4, 2004 back to April 15, 1997.

[3] This evidence--which the PUCO refused to consider as beyond the scope of the hearing--clearly establishes that SBC knew, understood and specifically agreed in 1997 that any refund obligation based on the assessment of charges in excess of lawful levels would relate back to April 15, 1997. While the PUCO improperly refused to consider SBC's direct admission of liability, the FCC is clearly not bound by this evidentiary ruling and should consider this evidence in the fulfillment of its federal obligations. Indeed, to the extent the FCC considers a claim that SBC never "took advantage" of the waiver, and, thus, the refund obligation never came into existence it would be prejudicial in the extreme to fail to consider SBC's specific and repeated admissions to the contrary.

21. Both AT&T and PUCO also argue that AT&T's rates were always lawful. Consequently, there is no unlawful rate against which to apply a refund. This argument is predicated on the allegation that AT&T's 1985 tariff was approved by PUCO and, therefore, reflected lawful rates and that those rates were then filed with PUCO in response to the FCC's order requiring the submission of cost-based rates under Section 276. With respect to the lawfulness of the 1985 rates, this argument completely misses the point. Indeed, even if those rates were lawful when filed, and in the specific context of that 1985 filing, the standard for review applied by the PUCO in 1985, before cost-based rates were required as a matter of federal law, was not the same (or even similar) to the New Services Test standard implemented pursuant to the Wisconsin Order. ***Thus, at most, all that can be said about AT&T's 1985 rates is that they were lawful under the costing regime applied by PUCO in 1985***.

22. ***Based on the PUCO Entry of September 15, 2005 (at p. 15), we know with absolute certainty that those same rates were never consistent with the New Services Test at any point after the effective date of Section 276***. Accordingly, that the PUCO found that the 1985 tariffed rates were lawful ***as a matter of the 1985 Ohio costing regime***, that is not now, nor was it ever the standard relevant to the determination of whether refunds are required commencing in 1997. ***Refunds are required because, contrary to AT&T's self-serving certification, its 1985 tariffed rates were never consistent with the New Services Test Standard, which is the sole determinant of the obligation to make refunds***. Both the PUCO and the Supreme Court of Ohio concur fully as to this essential fact, and the acceptance of this fact by the FCC requires the conclusion that refunds must be made.

23. Moreover, even if the FCC does not acknowledge the foregoing undeniable facts, AT&T cannot stand on its 1985 tariff as reflecting a lawful rate. Indeed, even minimal scrutiny

of the facts reveals that AT&T's claim that the 1985 tariff was filed in a timely manner, and in a manner consistent with state and federal requirements, is factually unsustainable. The truth is, AT&T simply ignored its obligation to file compliant rates and associated cost support and, instead, merely certified that its existing rates were consistent with its obligations under the New Services Test.

24. Specifically, as PAO explained in its comments, AT&T never advised the PUCO, within Case No. 96-1310,[4] as required by the December 19, 1996 Entry, that it intended to rely on its 1985 tariffs as reflecting its compliance with the New Services Test pricing standard. Moreover, even if this were not the case, the Cyvas letter and the associated cost support data, were not even submitted in Case No. 96-1310 as expressly required by PUCO. Instead, these materials were submitted in a wholly separate docket, Case No. 97-545, in support of SBC's effort to allow its affiliated payphone operations to become eligible to receive "dial around compensation." Even more significantly, despite its current rhetoric, during the relevant time period SBC specifically and directly admitted it never filed the required tariffs pursuant to the December 19, 1996 Entry in Case No. 96-1310.5 *See* the May 16,1997 filing in Case No. 97-545-TP-UNC and the August 11, 2003 SBC Motion to Strike, at pp. 3-4, attached to our opening comments as Exhibit One.

25. In this context, it is quite frankly undisputable that SBC did not make any filing, let alone the required tariff filing, responsive to the PUCO's December 19, 1996 Order by the January 15, 1997 date ***and*** that the PUCO erred when it concluded that it had approved SBC's tariff, inclusive of payphone service rates, on September 25, 1997. In fact, the AT&T rates

[4] As a result, the PUCO could not properly rely on SBC's 1985 tariff or any of SBC's subsequent filings in other dockets either as support for its claim of compliant rates or in support of its formal filing requirements.

[5]In this regard, it is also clear that SBC's May 16,1997 submission to the PUCO staff, its June 12, 1997 filing, and its June 23,1997 filing were not in response to the December 19,1996 Entry and, in any event, were made well outside the required filing period.

PUCO approved had not been reviewed for compliance with Section 276. Indeed, Finding (7) of the September 25, 1997 removes any doubt as to whether AT&T's rates were found to be compliant. Indeed, that Finding makes it absolutely clear that further actions and consideration were required to reach that conclusion.

> [t]he [PUCO] further observes that on June 30, 1997, the Payphone Association of Ohio filed a motion in this proceeding requesting that [PUCO] conduct an evidentiary hearing to determine whether LECs are in compliance with Section 276 of the 1996 Act, the FCC's decisions in CC Docket 96-128, and the [PUCO]'s decisions in this proceeding. The [PUCO] will issue a subsequent Entry(s) in this investigation addressing these issues.

See Entry of the Public Utilities Commission of Ohio in Case No. 96-1310-TP-COI at Finding 7 (September 25, 1997). However, AT&T never made an additional tariff filing and the PUCO never issued such an Entry finding AT&T's rates were compliant with Section 276. Thus, it is not surprising that the Ohio Supreme Court specifically found that no such filing was ever made.

> PAO is correct in stating that SBC did not file new tariffs following the PUCO's December 19, 1996 Entry.

See Payphone Association v. Public Utilities Commission, 109 Ohio St. 3d 453, at ¶ 11 (2006) ***As a result, neither PUCO nor AT&T can rely on AT&T's 1985 tariff or any of AT&T's subsequent filings in other dockets either as support for its claim of compliant rates or in support of its formal filing requirements and thus any finding or action by the FCC that is made on this basis would be clearly erroneous.***

2. In The Alternative, If The Commission Believes Preemption Is Required, It Possesses The Requisite Authority To Preempt Any Action Of The OPUC

26. As PAO explained in its Comments, the Telecom Act establishes a clear national policy favoring cost-based rates and full competition in the provision of payphone services. The Act also provides the absolute statutory authority for the FCC to preempt state regulatory schemes or

other requirements which fail to implement or which conflict with the federal mandate. Indeed, Section 276(c) could not be more explicit in mandating preemption in the case of a conflict between the states and the FCC: "to the extent that any state requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall pre-empt such state requirements." 47 U.S.C. § 276. That is, unlike many circumstances where preemption is allowed but reluctantly implemented, in this instance preemption is not optional; the FCC is required to preempt where, as here, a state's requirements are inconsistent with the federal mandate. In addition to the express preemption implemented by Section 276(c), the federal courts have also recognized that preemption will be deemed to occur where a federal regulatory agency has implemented a comprehensive regulatory scheme—thereby evidencing its intent to occupy the field—and where there is a need for uniformity in national policy. For example, in *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (S. Ct. 2000), the Supreme Court wrote:

> A fundamental principle of the United States Constitution is that Congress has the power to preempt state law. U.S. Const. art. VI, cl. 2. Even without an express provision for preemption, state law must yield to a congressional act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.

See also California v. *ARC America Corp.,* 490 U.S. 93, 101 (1989). ("Even without an express provision for preemption, we have found that state law must yield to a congressional Act . . . [W]hen Congress intends federal law to occupy the field, state law in that area is preempted.") And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. *Hines* v. *Davidowitz,* 312 U.S. 52, 66-67 (1941); *ARC America Corp., supra,* at 100-101; *United States* v. *Locke,* 529 U.S. 89 (2000) (slip op., at 17). We will find preemption where "under the circumstances of [a] particular case, [the challenged

state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines, supra,* at 67.

27. The FCC's regulation of dial around compensation is comprehensive and evidences a clear intent to occupy the field. Moreover, as the language of Section 276(c) explicitly states, there is a need for nationwide consistency regarding the treatment of payphones, including costing and refund issues. Each of these issues has been considered at length and is addressed in detail in the FCC's regulations. Allowing claims for refund to be decided on a piecemeal, state-by-state basis would frustrate the intended national policy, in clear contravention of congressional intent.

28. Moreover, in the payphone arena, the FCC has consistently recognized its right, and indeed its obligation, to preempt inconsistent state requirements. Indeed, in its Payphone Orders, the Commission specifically states it would preempt any state action inconsistent with the requirements of those payphone orders. *See Report and Order,* at ¶ 147; *Order on Reconsideration.* 11 FCC Rcd. 21233, 21328 (at ¶ 218). Moreover, the Commission has followed through on its commitment to do so. See, e.g., *In the Matter of New England Public Communications Council Petition for Pre-emption Pursuant to Section 253*

29. ***To the extent that the FCC determines that preemption is required to effectuate any aspect of the relief requested, the FCC clearly has the authority to preempt, and PAO specifically requests that it do so***. Both the federal mandate and policy, as set forth in Section 276 of the Act and implemented through the FCC's Payphone Orders, are clear and specific not only with respect to the obligation to establish cost-based rates, but to make refunds for all amounts charged in excess of those rates after April 15, 1997. In Ohio, unlike some other jurisdictions where the RBOC is denying that it "took advantage" of the waiver, it is absolutely clear AT&T knew, understood, and specifically agreed

in 1997, when it made its filings, that any refund obligation based on the assessment of charges in excess of lawful levels would relate back to April 15, 1997.

30. Further, in Ohio, unlike in some other jurisdictions, it is also absolutely clear and undeniable that PUCO found AT&T's payphone rate to be in excess of that allowed under the "New Services Test" and that it specifically and expressly ordered SBC to file tariffs containing the required lower rates (a material fact which, oddly, escaped the notice of Ohio's Supreme Court). Further, there is also no doubt that the limited refund requirement established by PUCO is facially and materially inconsistent with the FCC's mandate that refunds relate all the way back to April 15, 1997, and not just until the January 30, 2003 interim rate date, a date arbitrarily set by PUCO. Finally, there is no doubt of the inconsistency between the FCC's refund mandate and PUCO's refund order, which is material—inasmuch as the applicable refund period is nearly six years earlier under the PUCO order—and would result in the failure by AT&T to refund tens of millions of dollars in overcharges collected during that seven-year period.

31. Each of the prerequisites to preemption is clearly met in the instant matter. The issues at hand have been fully considered by PUCO and a final Order has been rendered by the Ohio Supreme Court. The resulting legal determinations are plainly and materially inconsistent with clearly enunciated federal law and policy. Accordingly, the Commission not only has the right, it has the obligation to preempt and to order full refunds back to 1997 as required by federal law.

32. AT&T wholly ignores this weight of the statutory authority and policies sustaining the right to preempt. Instead, AT&T argues: (i) there is nothing in prior Commission orders requiring "refunds when a state commission determines that a particular payphone line rate must be reduced;" (ii) there is "nothing in federal law [requiring] the Commission to preempt any state commission that declined to order such a retroactive refund;" and (iii) that

"Commission orders make clear that such remedial determinations are within the discretion of state commission, applying state law and procedures." *See* Comments of AT&T at 11-12.

33. This argument is so absurd that it should be shocking that AT&T would have the gall to present it in a formal FCC proceeding. In enacting Section 276, Congress had a specific and well defined purpose: to ensure the competitive nature of payphone services by, among other things, outlawing the cross-subsidization of payphone rates, outlawing discrimination or preference in the provision of payphone services, and requiring that payphone rates properly reflect the provider's costs.

34. The statutory language is neither subtle, nor is it hard to understand on these points and everyone, including AT&T, understood the game and how it was to be played. As a matter of fact, the FCC's original, September 20, 1996, Report and Order required AT&T and its brethren to submit tariffs by January 15, 1997, that included payphone rates which met the applicable cost standard. See FCC's Report and Order in CC Docket No. 96-128 (*In the Matter of Implementation of the Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*). The purpose of this requirement was to ensure, at least in theory, that payphone rates were brought in line with cost promptly, as was required by Congress. As set forth in PAO's Comments and in PUCO's Report and Order, AT&T failed to meet this filing requirement in a timely manner and it amended its rates solely pursuant to the PUCO's Order. *See* Opinion and Order of the Public Utilities Commission of Ohio, Case No. 96-1310-TP-COI (March 4, 2004). Indeed, the PUCO Order is clear:

> "[AT&T]'s calculation of the overhead loading for Answer Supervision is not compliant with the Physical Collocation Tariff Order methodology," and "It is, therefore, ORDERED, that [AT&T] institute permanent rates for COCOT Line, COCOT Coin Line, Local Usage, Answer Supervision, and Restricted Coin Access, consistent with….this Opinion and Order," and finally,

> "ORDERED, that [AT&T] file within 60 days of this Opinion and Order, in final form, three complete copies of tariff revisions which incorporate permanent rates consistent with the conclusions of this Opinion and Order."

Id. Instead, like many of its brethren, AT&T merely certified that its existing rates, which had been in place for many years, met the relevant cost standard. It is inconceivable that AT&T, in good faith, could have believed its rates met the applicable cost standard, and to no surprise, the PUCO concluded they did not.

35. In this context, it is difficult to understand how AT&T can argue, even generically, that refunds are not permitted or required. As an initial matter, Section 201 of the Communications Act expressly requires all carrier rates be just and reasonable and it expressly outlaws the charging of any rate that is not just and reasonable. Thus, certification or not, it is undisputable that AT&T's rates were in excess of the applicable cost standard, and were thus unjust and unreasonable, in violation of the mandate of Section 276, back to April 15, 1997.

36. Moreover, leaving all other considerations aside, there is ample legal authority within the Communications Act for the FCC to require the payment of retroactive refunds where the rate being charged is unlawful. Again, under Section 204(a) of the Communications Act, the FCC may order a "refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified." 47 USC 204(a). Thus, there is no basis to the argument either that the FCC is precluded from ordering refunds, or that the FCC was expressly required to have the authority to provide for refunds in this instance.

37. The FCC clearly has the not only the right, but the obligation under Section 201 to ensure a just and reasonable rate, and under Sections 202 and 276 to take measures to prevent and to address discriminatory practices. In this context, the FCC has not only the right, but the

obligation, to order retroactive refunds where, as here, those rates were found to be unlawful. AT&T's twin arguments that: (i) there is nothing in prior Commission orders requiring "refunds when a state commission determines that a particular payphone line rate must be reduced;" and (ii) there is "nothing in federal law [requiring] the Commission to preempt any state commission that declined to order such a retroactive refund" are, therefore at best, nothing more than straw men and transparent sophistry, and, at worst, plainly wrong Similarly, AT&T's third argument—that FCC orders make clear that such remedial determinations are within the discretion of state commission, applying state law and procedures—also fails given the FCC's indisputable authority to order refunds pursuant to Section 204, and its corresponding obligation to do so pursuant to Section 276.

C. Neither The Doctrine Of *Res Judicata* Nor The Filed Rate Doctrine Limit Or Preclude The FCC From Granting The Relief Requested By The PAO

1. The Doctrine Of *Res Judicata*

38. AT&T argues the PUCO judgment and that of the Ohio Supreme Court are final, and that the FCC cannot arrogate to itself the power to review or ignore the judgment of the courts, which AT&T characterizes as an opportunity for PAO, through its instant petition, to launch an impermissible attack on a binding judgment. Using a *res judicata* argument, AT&T argues that PAO cannot thereby relitigate such a final judgment before the FCC. *See* AT&T Comments, at pp. 1, 5.

39. Within this argument, AT&T states the U.S. Supreme Court has held courts must recognize state agency decisions where the parties had an adequate opportunity to litigate. *Id.* at 6. AT&T, as does PUCO, also submits the refund issue was indeed addressed by PUCO in prior orders and the Ohio Supreme Court affirmed. Therefore, according to AT&T, there is no

justification for involving the FCC in this dispute with the aim, in AT&T's mind, to upset what it characterizes as a final judgment, especially as the FCC was not a party to prior proceedings. AT&T further argues that collateral estoppel also applies to quasi-judicial proceedings. *Id.* at 7.

40. PUCO suggests that PAO wants what it calls a "regulatory mulligan" – essentially a "do-over". *See* Comments of the Public Utilities Commission of Ohio, at 4. PUCO maintains it did not fail to implement Section 276 and the related and corresponding FCC orders, as required by the FCC. If it had not, PUCO states PAO's motion "would certainly be understandable." *Id.* PUCO further insists it heard the refund issue and found PAO was not entitled to any refund other than that already ordered. PUCO then denied rehearing, finding PAO failed to raise any new issues, new facts or new questions of law, and that the decision of the Supreme Court of Ohio is final. *Id.* at 6

41. The doctrine of *res judicata* is well established. It is an affirmative defense which may, in very specific and well-defined circumstances, bar the same parties from litigating another lawsuit on the same claim or claims, or on any other claim arising from the same transaction or set of transactions which could have been raised, but were not, in the first lawsuit. However, because the *res judicata* defense can limit a party's due process rights, its application is narrow and is closely scrutinized by the courts. It is well established that the doctrine is:

> to be applied in particular situations as fairness and justice require, and . . . it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. . . .
>
> * * *
>
> Underlying all discussion of the problem must be the principle of fundamental fairness in the due process sense. It has accordingly been adjudged that the public policy underlying the principle of *res judicata* must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which to present his case." 46 American Jurisprudence 2d 569-570, Judgments,

> Section 402, quoted with approval in Goodson v. McDonough Power Equip., Inc., 2 Ohio St.3d 193, 202 (1983).

In addition to these general principles, the asserting party has a substantial burden to establish the existence of each the following three threshold factual prerequisites: (1) there must be an earlier decision on the issue; (2) there must be a final judgment on the merits of the claim or claims; and (3) the same parties or parties in privity with the original parties. *Restatement (Second) of Judgments* § 17, 24 (1982). *See also, Lawlor v. National Screen Service Corporation,* 349 U.S. 322, 75 S.Ct. 865 (1955); *In re Bose Corporation,* --- F.3d ---, 2007 WL 416919 (C.A. Fed. Feb. 8, 2007); *Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210 (C.A.D.C. 2004).

42. Moreover, and most significantly, for *res judicata* to act as a bar to a future claim or proceeding, the asserting party must demonstrate the questions of fact and law raised in the second proceeding "have been fully and fairly litigated and finally decided." *Durfee v. Duke,* 375 U.S. 106, 111 (1963). For claims to have been "fully and fairly litigated," the party against whom the *res judicata* defense is asserted must have had the opportunity to present evidence on the matters at issue. *See, e.g., Local 1006, American Federation of State, County and Mun. Employees,* 558 F.Supp. 230 (D.C. Ill, 1982), citing *Moore v. Bonner*, 526 F.Supp. 143, 147 (D.S.C. 1981), citing *Painters District Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969) ("[T]he minimum procedures. . . include [ ] a full hearing; representation by counsel; a full opportunity to present evidence; and the right to call, examine, and cross-examine witnesses."); *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 713-714 (4th Cir. 1993) ("Nor do principles of *res judicata* or collateral estoppel apply with respect to the district court's denial of Bethlehem's January 11, 1991 motion for judgment on the debt. That earlier ruling of the district court was not on the merits, *see Ivy v. Dole,* 610 F.Supp. 165, 167 (E.D. Va. 1985), *aff'd,* 811 F.2d 1505 (4th Cir. 1987), nor was the issue that was ruled on fully

and fairly litigated, *see Moore v. Allied Chem. Corp.*, 480 F. Supp. 377, 382 (E.D. Va. 1979). The district court heard no testimony, examined no evidence, and made no findings of fact or conclusions of law. It clearly deferred ruling on the merits, stating that it would take "no further enforcement action . . . at this time.").

43. As an initial matter, the doctrine of *res judicata* is most typically and readily applied to court proceedings and some courts have found *res judicata* principles do not apply to administrative proceedings." *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394 421-422, 1559- 60 (1966) (footnotes omitted). *McCarren v. Town of Springfield, Vermont*, 464 U.S. 942, 945 (1983). However, even if the doctrine could be applied in the instant administrative context, AT&T's and PUCO's attempt to preclude FCC consideration of the PUCO order below on the basis of *res judicata* is a red herring. Congress specifically ordered and authorized the FCC—not PUCO or the courts of the State of Ohio—to implement the requirements of Section 276, including the regulations necessary to do so. 47 USC § 276(a)(b). As such, there is no doubt, either that PUCO and its orders are each subordinate to the FCC's ultimate jurisdiction, or that the FCC, and the FCC alone, has the legal authority to decide each of the issues asserted by PAO in its Petition. As such, it is a plain misapplication of the doctrine of *res judicata* to attempt to apply it to the instant circumstances.

44. It is not surprising that neither AT&T nor PUCO—who carry the burden on the *res judicata* issue—can point to any language in Section 276 or in any FCC order that even suggests, let alone states, that the FCC's assignment of certain decision-making to the states was anything other than an assignment of the right to engage in the fact finding required to make an initial determination of the lawfulness of the applicable payphone rates.[6] Moreover, given the

[6] Indeed, it is widely understood that the federal courts owe "extraordinary deference" to this Commission's interpretations of its own rules. *Capital Network Systems v. FCC*, 28 F.3d 201 at 206. See also Reply Comments of

language and the legislative history of Section 276, it is clear that any attempt by the FCC to cede ultimate jurisdiction to address either the lawfulness of the applicable payphone rates or the obligation to make refunds to the State of Ohio would be unlawful. Accordingly, given Congress' direct invocation of the FCC's jurisdiction in Section 276, and thus the FCC's clear obligation to make all associated final determinations, the doctrine of *res judicata* has no legal application to the instant circumstances.

45. Not only is the doctrine inapplicable to the instant circumstances, neither AT&T nor PUCO can come close to meeting their burden to establish the requisite facts. Indeed, neither AT&T nor PUCO even assert PAO was afforded the opportunity to present evidence on the refund issue. The reason for this telling failure is that, even among AT&T's and PUCO's often startling mischaracterizations, even they know that no such claim is possible. Quite to the contrary, as AT&T and PUCO are well aware, PUCO expressly and repeatedly refused to allow PAO to make any substantive argument or to present any witness or evidence on the refund issue. Indeed, in its order, PUCO

> . . . emphasized that the PAO has raised the issue of refunds on several occasions [footnote omitted]. On each occasion, the Commission stated that **refunds are beyond the scope of this proceeding** . . ."

Public Utilities Commission of Ohio, 96-1310-TP-COI, at p.5 (emphasis added). ***As if to remove any doubt, in reviewing the PUCO order, the Ohio Supreme Court specifically confirmed that: "PUCO refused to address the issue of refunds for any period before the interim tariff rates were approved in 2003. . . ."*** *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 459, 2006-Ohio-2988 (2006). Thus, even if the doctrine of *res judicata* could be considered, it is

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The Independent Phone Company of New York, Inc. ("IPANY") (filed, February 1, 2005); APCC Comments (January 18, 2005). If federal courts must pay extraordinary deference, then indeed, so must state agencies and state courts to an even greater degree. To hold otherwise is to turn centuries of American jurisprudence completely on its head.

totally beyond dispute PAO was not afforded the minimum due process guarantees required for the FCC to be precluded from considering the refund issue on this basis.[7]

46. The cases cited by AT&T in support of its *res judicata* argument are equally ineffectual. First, AT&T invokes *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993) for the notion the FCC cannot "arrogate to itself the power to (a) review or (b) ignore the judgments of the courts." *Id.* at 430. This case, which has been invoked previously by several of the RBOCs, fails again in this instance. As other parties have noted, *Deerfield* was decided before the Telecommunications Act of 1996 was enacted, and does not involve a circumstance in which the governing statute expressly gives jurisdiction to the FCC; thus, the case is therefore inapplicable to this current matter. More tellingly, as explained by Independent Payphone Association of New York ("IPANY") in its Reply Comments (February 2, 2005, at pp. 7-8), the Second Circuit's opinion in *Deerfield* revolved around the Separation of Powers doctrine inherent in the U.S. Constitution:

> A judgment entered by an **Article III** court having jurisdiction to enter that judgment is not subject to review by a different branch of government.
>
> * * *
>
> Since neither the legislative branch nor the executive branch has the power to review judgments of an **Article III** court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no power.

Id. (emphasis added).

47. Needless to say, in the current circumstances, PAO is not challenging the judgment of an Article III federal court. The order being challenged originated in the PUC of Ohio and was subsequently affirmed by the Ohio Supreme Court. Moreover, the *Deerfield*

[7] As discussed below, the PUCO's refusal to consider the coalition letters to the FCC or AT&T's letter to PUCO expressly promising refunds back to April 15,1997, further demonstrates that PAO did not have a fair opportunity to present its case and that the PUCO failed to address the issue of refunds as beyond the scope of its proceeding.

decision has been limited by succeeding case law which makes clear a federal agency is not barred by principles of *res judicata* from preempting the highest court of a state. *Arapaho County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213 at 1220, fn. 8, *cert. den.* 534 U.S. 1064, 122 S.Ct. 664 (10th Cir. 2001).[8]

48. Specifically, and contrary to AT&T's assertion, the *Arapaho* decision makes it abundantly clear that a defense based on collateral estoppel—which is predicated on the same legal theory as a defense of *res judicata*--does not apply where a federal agency whose review would be estopped was not a party to any of the proceedings in the state courts. Indeed, the Tenth Circuit in *Arapaho* expressly refused to apply collateral estoppel to an order of the Federal Aviation Administration ("FAA"), which preempted the decision of the Supreme Court of Colorado, expressly because: ". . . the FAA was not a party to, nor in privity with a party to the state court proceedings. . . Without the FAA as a party, the Colorado Supreme Court decision does not satisfy a fundamental requirement of issue preclusion under federal or Colorado law." *Id.* at 1220.[9] As the FCC was not a party to the PUCO or Ohio Supreme Court proceedings, *Arapaho* is plainly inapposite and cannot stand as a basis for precluding FCC review on the basis of *res judicata*.

49. Even more significantly perhaps, is the fact that *Arapaho* stands squarely for the proposition that the defenses of collateral estoppel and *res judicata*, relied upon by AT&T (and many other RBOCs in similar circumstances) do ***not*** prevent preemption of a state court decision which is in violation of federal policies and rules.

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[8] As IPANY set forth in its Reply Comments in 2005, in invoking the FCC's *Deerfield* Order (subsequently set aside by the Second Circuit in specific regard to a decision's having been already issued by an Article III court), where application of collateral estoppel would result in "unfairness," the Commission would step in to adjudicate the underlying issue. Since the instant matter does not involve an Article III federal court, the FCC can most certainly refuse to apply collateral estoppel due to "unfairness."

[9] *See also Baker by Thomas v. General Motors Corp.*, 522 U.S. 222 at 237, 118 S.Ct. 657 ("In no event . . .can issue preclusion be invoked against one who did not participate in the prior adjudication."). *Baker* is discussed further, below.

> We further agree these common law doctrines extending full faith and credit to state court determinations are trumped by the Supremacy Clause if the effect of the state court judgment or decree is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy.

Id. at 1219. This same reasoning has been held to apply "within the context of the Telecommunications Act of 1996." *Iowa Network Services Inc. v. Qwest*, 363 F.3d 683 at 690 (8th Cir. 2003). Thus, rather than establishing that the doctrine of *res judicata* can be used to bar FCC consideration of the PAO Petition, in fact, *Deerfield* and its progeny conclusively establish the FCC is ***obligated***, to do so where, as here, there is an allegation a state order is contrary to federal policy as established by Section 276.

50. AT&T also invokes *Montana v. United States*, 440 U.S. 147 (1979) in support of the applicability of *res judicata* to the instant circumstances. However, *Montana*, unlike in the pending matter before the FCC, involved a government contractor who, at the behest of the United States, filed suit in the Montana courts to attack the constitutionality of that State's imposition of a one-percent gross receipts tax on contractors of public (not private) construction projects. The Montana Supreme Court upheld the tax, but the contractor did not pursue the matter up to the U.S. Supreme Court at that time. Instead, the contractor challenged the constitutionality of the tax in a subsequent lawsuit, which was decided in the contractor's favor by the State court of appeals. When it then came before the U.S. Supreme Court, the State appellate decision was reversed on *res judicata* grounds, and rightly so.

51. The facts of *Montana* are clearly inapposite to the instant. In *Montana*, there was indeed a judgment on the merits of the issue being pursued. Moreover, critical to the *Montana* decision was the fact the petitioner had failed to pursue its remedies. PAO, in contrast, suffers from no such deficiencies; rather, PAO has been diligent at all levels, not only in repeatedly

seeking the opportunity (denied to it) to present evidence on the refund issue, but also in its efforts to obtain PUCO consideration of such evidence and to obtain relief from the Ohio Supreme Court arising out of PUCO's failures to do so. In this context, it is apparent that the *Montana* decision does not support AT&T's effort to bar consideration of the refund issue through application of *res judicata*.

52. AT&T recites the following language from *Grava v. Parkman Twp.*, 653 N.E.2d 226 (Ohio 1995) in further support of its *res judicata* argument: "[A] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them. [citations omitted]" *Id.* at 228. Significantly, however, the *Grava* court goes on to note that the application of *res judicata* requires the claims at issue either were litigated, or could have been litigated. *Id.* at 229. Unfortunately for AT&T, none of these requirements is found in the instant matter; that is, PAO was expressly and repeatedly precluded from presenting any evidence or witnesses on the refund issue and the final order issued by PUCO does not substantively address that issue. Thus, once again, AT&T's case provides no support for its position.

53. Curiously, AT&T also cites the following language from the Supreme Court in *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222 (1998) in its quest to find any validation of its *res judicata* claim, which states:

> [A] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (i.e., *res judicata*) purposes [footnote omitted], in other words, the judgment of the rendering State gains nationwide force.

Id. at 233 [citations omitted]. Unlike the instant circumstances, which involve the review by a regulatory agency of a decision of the State of Ohio, *Baker* involved enforcement of an injunction issued by one State in a sister State. The Supreme Court in that proceeding used the doctrine of *res judicata*, in conjunction with the Full Faith and Credit doctrine, to preclude the second State from overturning the lawfully-issued injunction issued by the first State. Moreover, while AT&T carefully ignores mention of this fact, the *Baker* decision did not involve a circumstance where the petitioner was barred from presenting evidence or witnesses, or where the decision of the first state failed to address the merits of issue raised in the second proceeding. Thus, on each of these bases, *Baker* is inapposite and does not provide any rationale or authority for the application of *res judicata* to bar consideration of PAO's Petition.

54. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) is cited by AT&T for the proposition that, ". . . when a state agency 'acting in a judicial capacity … resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' [citation omitted] federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts." *Id.* at 799. Once again, this citation borders on the bizarre as neither of the material bases for the court's decision exist in the instant matter. Specifically, unlike *University of Tennessee*, PUCO expressly refused to allow PAO any opportunity (let alone the "adequate opportunity" found in *University of Tennessee*) to litigate the refund issue nor did it resolve the issue through the consideration of the record. Accordingly, *University of Tennessee*, like all the other cases cited by AT&T, is plainly inapposite and does not provide any rationale or authority for the application of *res judicata* to bar consideration of PAO's Petition.

55. AT&T presents *Puerto Rico Maritime Shipping Auth. V. Federal Maritime Com'n*, 75 F.3d 63 (1st Cir. 1996) and *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), to support its argument that PAO is requesting the FCC to act in a "quasi-adjudicatory capacity" with respect to its rights to a refund going back to 1997, which, according to AT&T, is tantamount to a collateral attack on a prior judgment. In *Puerto Rico*, the First Circuit focused on claim preclusion, and stated "the doctrine that '[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.' [citation omitted]." *Puerto Rico*, 75 F.3d at 66. In *NLRB*, the First Circuit (again) sets forth its definition of issue preclusion, as its having five essential elements: "1. the determination . . . must be over an issue which was actually litigated in the first forum; 2. that determination must result in a valid and final judgment; 3. the determination must be essential to the judgment which is rendered by, and in, the first forum; 4. the issue before the second forum must be the same as the one in the first forum; and 5. the parties in the second action must be the same as those in the first." *NLRB*, 836 F.2d at 34. As explained, repeatedly, above, this case is inapposite because, among other things, neither PUCO nor the Ohio Supreme Court are Article III Courts, because PAO was denied the required "opportunity to litigate in the first forum," and because the FCC was not a party to the PUCO or Supreme Court proceedings.

56. Finally, AT&T, cites *Graybill v. United States Postal Service*, 782 F.2d 1567 (Fed.Cir. 1986) for the proposition that ". . .the same principles of judicial efficiency which justify the application of the doctrine of collateral estoppel in judicial proceedings also justify its application in quasi-judicial proceedings." *Id.* at 1571 [citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3d Cir. 1981)]. In *Graybill*, an employee of the U.S. Postal Service

was terminated after he initially pled guilty to a series of charges of criminal child abuse and sexual intercourse with a minor (his stepdaughter). Graybill appealed his termination to the Merit Systems Protection Board ("MSPB"), arguing his innocence as to the charges (those charges to which he earlier pled guilty before a court). The MSPB affirmed the Postal Service's decision that his termination would promote the efficiency of the postal service. The Federal Circuit reasoned "[T]his Court cannot merely substitute its judgment for that of the MSPB. Rather, an agency's action must be affirmed unless it is found to be: 1. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2. obtained without procedures required by law, rule, or regulation having been followed; or 3. unsupported by substantial evidence. [citation omitted]." *Graybill*, 782 F.2d at 1570.

57. In the instant matter, PAO is not asking the FCC to substitute its judgment for that of PUCO, because PUCO ***never rendered a judgment*** in the matter of refunds going back to 1997. As such, there is no issue of judicial efficiency, as the substantive consideration of the refund issue by the FCC requested by PAO would be the first such consideration of this issue. Moreover, PUCO's action was indeed arbitrary, capricious, an abuse of discretion and, most certainly, not in accordance with the Telecommunications Act. These facts clearly distinguish the instant facts from the decisional facts of *Graybill*. This case is plainly inapposite and is precluded from providing any rationale or authority for the application of *res judicata* to bar consideration of PAO's Petition.[10]

[10] AT&T asks the Commission to consider *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, 125 F.3d 18 (1st Cir. 1997), as a comparison to the immediately above-discussed cases. In *Bath*, the court noted the tendency favoring the application of collateral estoppel in administrative contexts, but cautions against an overly broad generalization. *Id.* at 21. The facts in *Bath* involved a man who was injured on the job, given a desk job and, over a period of time, became further disabled due to subsequent injuries, and was finally terminated. There were also issues of a Statute of Limitations bar. Needless to say, it is curious, indeed, why AT&T has cited this case. Clearly, the facts in the instant matter are breathtakingly different from the facts in this case. Furthermore, due to PAO's continuous and aggressive prosecution of its rights, there would definitely be no Statute of Limitations bar.

58. When all is said and done on the issue of *res judicata*, it is clear and beyond dispute PAO was not given a fair opportunity to present evidence or witnesses on the refund issue in any proceeding and the Ohio Supreme Court expressly refused to engage on that issue. Accordingly, even if the doctrine of *res judicata* could be considered and was not trumped by the express right of preemption set forth in Section 276, as discussed above, neither AT&T nor PUCO has met its burden to justify the application of the defense. Thus, while it is certainly understandable why AT&T and PUCO would seek to preclude the review of the PUCO order below, the law simply does not prevent the FCC from doing so on the basis of *res judicata*.

2. The Filed Rate Doctrine

59. AT&T and PUCO make substantially similar arguments that refunding PAO's overpayment to AT&T for payphone services would constitute an unlawful ratemaking as is violative of the filed rate doctrine at the state and federal levels. These arguments are not sustainable either as a matter of fact or law.

60. The principles of retroactive ratemaking and the filed rate doctrine are each based on the application of tariff filing and application requirements set forth in Section 203, 47 U.S.C. § 203, of the Communications Act. Section 203 requires all common carriers to file schedules (tariffs) showing "all charges" for the "interstate and foreign wire or radio communication services" that it provides, as well as the classifications, practices, and regulations affecting such charges. In addition, Section 203 declares it unlawful for any carrier to "demand, collect, or receive a greater or less or different compensation" for such communication services.

61. As the Commission is well aware, and as PAO argued in its Petition, the filed rate doctrine has for decades been a weapon used by carriers to collect rates in excess of the rates contained in direct agreements between that carrier and its customers. Indeed, this very issue

was among the issues often cited by the Commission as a justification for eliminating the interstate tariff filing requirement. However, as troubling as this issue was, and as aggressively as the doctrine was enforced by the courts, ***the doctrine has never been applied in circumstances where, as here the tariff rate was unlawful, as a matter of federal law from the outset of the refund period***. To the contrary, the cases in which the filed rate doctrine has been applied always involved a fact pattern where the customer had signed an agreement containing rates that were more favorable than those found in the carrier's lawful tariff. In those cases, the courts generally found that the customer could not take advantage of the more favorable contract rates, terms or conditions, but was instead bound by the less favorable, but lawfully tariffed rates, even if the customer had no actual knowledge of those rates.

62. No such facts apply to the rates charged by AT&T for payphone services. Even under AT&T's shell-game tariff approach, it is undisputed, and beyond dispute, that its rates were in excess of the rates allowed pursuant to Section 276 until the PUCO-ordered adjustment following the Wisconsin Order, which, the FCC explains, and as has been argued by the APCC, was not new law or an amendment of existing law, but a clarification of Section 276. NST Review Order at 2065-71. By definition, and in contrast to the assertions of PUCO and AT&T and the holding of the Ohio Supreme Court, its intrastate payphone rates were not lawful from April 15, 1997 until the PUCO-ordered AT&T to lower its rates to come into compliance with the New Services Test.

63. Moreover, unlike other jurisdictions where the RBOC may have filed tariffs setting forth interim rates it alleged to be compliant with the New Services Test and Section 276, as explained above, AT&T never made such a filing. To the contrary, AT&T merely certified, falsely, to PUCO by letter that its rates were compliant. Moreover, the tariffs on which it claims

to rely did even contain payphone (COCOT) rates. *PUCO Opinion and Order, at 30*. By making the certification, rather than filing compliant rates, AT&T took the risk that its rates would exceed those lawfully allowed, and it cannot hide by an failed and unlawful certification and filing, by asserting the application of the filed rate doctrine..

64. As set forth in PAO's original motion, it is well-established that while a carrier may have the right to impose the rates included in its tariffs on its customers, those rates do not become the lawful rate if they are unreasonable or otherwise in violation of law. Indeed, Section 201 of the Communications Act imposes an affirmative duty on the FCC to ensure that "[A]ll charges, practices, classifications, and regulations for and in connection with [jurisdictional] communication service, shall be just and reasonable." Significantly, Section 201 further declares any "charge, practice, classification, or regulation that is unjust or unreasonable" to be "unlawful." In its Payphone Orders, the FCC specifically concluded that only rates consistent with the New Services Test would meet the requirements of Section 276, and thus any rate in excess of such rates would not be just and reasonable.

65. Moreover, as set forth above, the Communications Act itself specifically provides for the payment of retroactive refunds where the rate being charged is unlawful. Specifically, under Section 204(a) of the Communications Act, the FCC may order a "refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified." 47 USC 204(a).

66. Not only is it clear from the language of the Communications Act that rates be just and reasonable, and that retroactive refunds may be ordered, the Courts have also repeatedly made clear that "[the Commission] [has] the power . . . of determining the reasonableness of the published rate." *Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Railway Co.,* 284 U.S. 370,

390 (1932). More significantly, as recognized by the Supreme Court, courts have consistently held that where a rate is determined to be unreasonable after it has been applied, and overcharges assessed, "reparation was to be awarded." *Id.* As explained by the Court, this requirement is particularly clear where, as here, the carrier makes its own rates, which are then determined by the FCC to be unjust and unreasonable:

> As respects a rate made by the carrier, [the Commission's] adjudication finds the facts, and may involve a liability to pay reparation. [T]he great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

Id. at 186. Where the rates are found to be excessive, not surprisingly, the Supreme Court has held -- consistent with the FCC's mandate in this matter -- that the "award of reparation should be measured by the excess paid . . . ." *Id.* at 184.

67. Not only have the Courts made clear that the filed rate doctrine does not apply to an unlawful rate or an unapproved tariff in other, comparable, circumstances, but they have done so in a case that is on all fours with the instant matter. In *Davel Communications v. Qwest*, the Ninth Circuit specifically held, in response to a claim by Qwest that it had no obligation to issue refunds to the Davel payphone service providers, that the filed rate doctrine is inapplicable with respect to the Second Waiver Order.

68. In rejecting Qwest's arguments, the Court relied upon Supreme Court precedence which held "claim[s] that a carrier's rates were not "reasonable" as required by [the] Interstate Commerce Act, was not barred by the filed rate doctrine." *Reiter v. Cooper*, 507 U.S. 258 (1993). The Ninth Circuit reasoned that Davel's complaint, which arose under §§ 201 and 276 of the 1996 Act, was "nearly identical to the provision of the Interstate Commerce Act at issue in *Reiter*, requiring telecommunications rates to be just and reasonable." *Id.* at 9732. The Court

added, "[s]ection 276 adds the further command that a carrier may not set its payphone rates so as to discriminate in favor of or subsidize its own payphone services, and instructs the agency to implement regulations requiring rates to meet the new services test," and then concluded, "[a]s in *Reiter*, these requirements, as well as the provision conferring on Davel a right of action for their enforcement, are accorded by the regulating statute which imposed the tariff filing requirement and are therefore not precluded by the filed rate doctrine. *Id*.

69. The Ninth Circuit's *Davel* opinion also acknowledges the Supreme Court's holding in *Transcon Lines*, which established that "a regulating agency may require a departure from a filed rate when necessary to enforce other specific and valid regulations adopted under the Act, regulations that are consistent with the filed rate system and compatible with its effective operation." *I.C.C. v. Transcon Lines*, 513 U.S. 138, 147 (1995). Accordingly, the Ninth Circuit concluded "[h]ere, the FCC, in adopting the Waiver Order, expressly required a 'departure from a filed rate' as to some non-compliant intrastate public access line tariffs." *Davel Communications v. Qwest*, --- F.3d ----, 2006 WL 2371972 (C.A.9 (Wash.)). "Consequently, the filed-rate doctrine does not stand as a bar to the reach of and then enforcing of the Waiver Order's reimbursement requirements in a case such as this one." Slip Op., at 7049. Thus, the filed rate doctrine cannot stand as a barrier to the rightful enforcement by the FCC of the refund obligation as set forth in the Second Waiver Order.

70. Further, even if the Commission were to find the filed rate doctrine to apply, as discussed at length above, the RBOCs—including AT&T—separately and specifically committed to the FCC that they would refund amounts collected in excess of the filed rate, and that they would do so back to April 15, 1997. Specifically in its letters to the Commission of April 10, 1997, the RBOCs

coalition, which included AT&T, directly represented through their counsel that such retroactive refunds would voluntarily be made:

> I should note that the Filed-Rate Doctrine precludes either the state or federal government from ordering such retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.

71. As with the underlying representation and commitment to make refunds, this additional representation and commitment was offered, and accepted, as direct consideration for the right immediately to commence collecting millions of dollars in dial around compensation. As AT&T has benefited materially from this right, it must, both as a matter of contractual and ethical commitment, and as a matter of its compliance with its obligations under Section 201, be required to make refund of all excess revenues back to April 15, 1997.

72. Finally, even absent AT&T's agreement to refund, neither the filed rate doctrine nor the any doctrine based on retroactive ratemaking provides a legally cognizable basis for refusing to require refunds back to April 15, 1997. This conclusion is required by the fact that the Commission's Refund Order specifically established the refund obligation back to that date, thus rendering any excessive rates conditional *ab initio*. As such, any downward adjustment in the lawful rate is nothing more than a proper implementation of rates which were conditioned on, and subject to, change through refund from the date they were implemented.

D. AT&T's Rates are Prima Facie Anti-Competitive

73. As discussed in the PAO Petition, Section 276(a) prohibits any Bell Operating Company providing payphone service from acts which would "subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and ***shall not prefer or discriminate*** in favor of its payphone service. 47 U.S.C.A. 276(a) (Emphasis added). The clear intent of this provision was to level the competitive playing

field between RBOC-provided payphones and private payphones by requiring, *inter alia*, that the rates charged by the RBOCs be cost-based.

74. In addition to the clear mandate of Section 276, it is also well settled that the FCC is required to consider issues of anti-competitive conduct and effect as a part of its obligation to serve the public interest. "The Commission retains a duty of continual supervision…and this includes being on the lookout for possible anticompetitive effects." See *National Association of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 638 (1976); *United States v. R.C.A.*, 358 U.S. 334, 351 (1959); *F.C.C. v. R.C.A. Comm., Inc.*, 346 U.S. 86, 94 (1953); *N.B.C. v. United States*, 319 U.S. 190, 223 (1943); *Radio Relay Corp. v. F.C.C.*, 409 F.2d 322, 326 (id Cir. 1969).

75. Neither AT&T nor PUCO directly addresses this obligation. Indeed, inasmuch as AT&T is relying on a tariff filed in 1985—a full decade before the enactment of Section 276—there can be no question that any unwritten and unstated competitive analysis of the rates contained in that tariff made by the PUCO did not consider, and could not have considered, the obligations imposed by Section 276. As a result, the approval of that tariff provides no basis for any conclusion as to the anti-competitiveness of AT&T's rates either generally or in the context of Section 276. Moreover, Section 276 and the cited cases clearly impose an independent obligation on the FCC to engage in a competitive analysis, as a part of its public interest mandate. Any such analysis—even if it were actually done by the PUCO—cannot meet this burden.[11] Accordingly, to the extent that the FCC does not order refunds pursuant to any of the

[11] AT&T's argument is all the more absurd in the context of Section 276. Indeed, it was the well known price discrimination and anti-competitive behavior of the RBOCs in the payphone industry which was the very reason why Congress felt compelled to address this issue and to compel cost based rates in Section 276. The overwhelming evidence of price discrimination and anti-competitive charges also casts substantial doubt on the good faith basis of AT&T's certification—which, of course, was later proven untrue—that its 1985 rates met the applicable cost standard.

other bases set forth herein, it must do so on the grounds that those rates are per se anticompetitive and thus contrary to the public interest.

E. Monetary Penalties Should Be Imposed On AT&T For Its Continuing Violations of the Commission's Orders

76. In its Petition, the PAO argued monetary penalties should be imposed on AT&T for its continuing failure, for more than nine years, to employ payphone rates and to collect payphone charges that were well in excess of lawful levels. Amazingly, but not surprisingly, AT&T responds to this argument by claiming that it cannot be held to account for its overcharges because the rates that it charged were part of an approved tariff. As an initial matter, as demonstrated above, AT&T never made the referenced tariff filing, and thus it cannot rely on that filing as a defense here. Moreover, AT&T's argument cannot possibly be sustained in this context, where it was AT&T which certified that the rates contained in the already approved tariff met the independent costing standard set forth in the Wisconsin Order. Clearly, by making the election to certify, AT&T and AT&T alone took the risk that its rates—which it had to know were above the applicable cost—would be so found. Nonetheless, AT&T not only went forward with its false certification, but it now has the gall to use that false certification as a shield against the necessary consequences.

77. Of course, not only did AT&T's false certification allow it to continue to collect payphone charges in excess of that applicable costing standard, it also utilized that false certification as the basis for collect dial-around compensation from the outset. Thus, not only has AT&T gained competitively by charging the members of the PAO rates that are well in excess of cost-based levels since 1997, it has also benefited through its collection of millions of dollars in dial-around compensation that was supposedly tied to this same cost standard. AT&T has achieved each of these material economic benefits as a result of its ongoing failure to meet its specific commitment, as implemented through the FCC's order, to refund amounts collected in excess of the lawful rate.

78. Section 503 of the Communications Act requires the imposition of monetary forfeiture penalties where a party has "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation or order issued by the Commission . . . ." 47 U.S.C. § 503. In such circumstance, the violating party is subject to a penalty of up to $100,000 per day per violation, not to exceed $1,000,000 per violation. *Id.*

79. AT&T does not respond directly to this argument. Instead, it appears to fall back on the claim its rates were found to be lawful by PUCO and thus it did not engage in any conduct which would require the imposition of forfeitures. However, this argument fails for two reasons. First, even if AT&T's rates were approved as it claims, the PUCO ultimately found they were in excess of the applicable costing standard. This finding requires the conclusion AT&T rates were, in fact, in excess of the lawful rate from the outset. Given that the only reason that these rates were in place was because AT&T certified they met the new costing standard, AT&T certainly cannot be excused from the consequences of its false certification.

80. Secondly, even if this were not the case, AT&T made an independent commitment to the FCC to refund any overcharges that resulted from the application of its tariffed rates. AT&T has breached, and continues to breach, this commitment, which constitutes a further basis for the imposition of forfeitures.

F. Until Full Refunds Are Paid, SBC Must Be Required to Return All Dial-Around Charges It Has Collected

81. In its Petition, PAO argued that where, as here, a party willfully violates an agreement with the FCC, the FCC has the right, and in this case most certainly must require, that party disgorge all monetary gains obtained through violation of that agreement. In this instance, this clearly means that AT&T must be required, in addition to the penalties imposed for its violation of Commission Orders, immediately to deposit with the Commission all dial-around charges that it has collected since April 15,

1997. A failure to impose this remedy would have the perverse effect of continuing to reward AT&T both for its failure to charge cost-based rates, as well as for its willful and blatant breach of its refund agreement.

82. In its Comments, AT&T asserts, rather remarkably, that PAO does not have standing to request disgorgement because it is not a payer of dial around compensation. This argument cannot withstand even minimal scrutiny as it assumes that the only basis for standing is the status of the party as a payer of dial around compensation. However, this argument ignores the more direct standing PAO has as a clearly intended beneficiary of the agreement under which AT&T was allowed to collect dial around charges. Indeed, had AT&T lived up to its obligation, PAO would have benefited directly by the payment of refunds for the overcharges found to have occurred. Thus, there can be no doubt that PAO has standing to demand disgorgement.

83. But, in fact, there is an even greater principle here. AT&T made a direct and express commitment to the FCC that it would refund any overcharges and that it would do so back to April 15, 1997. It also committed that it would not assert certain legal defenses against such obligation and, whether those defenses are legitimate or not, it has directly and repeatedly broken that commitment. When these commitments were made, PAO relied directly on them, and the understanding that the FCC would enforce them, in electing not to challenge the order allowing the collection of dial around compensation. The question now posed to the FCC is whether it will use its power to require AT&T to live up to its commitment or whether it will punish PAO, which played by the rules and reasonably relied on the commitment, by allowing AT&T to walk away Scot free. It is clear which path is not only the one required by the law, but also the just one.

CONCLUSION

It is beyond dispute that AT&T's rates were in excess of the lawful cost from April 17, 1997 to the date they were reduced by order of the PUCO. As set forth herein, the FCC has both the right and the authority to order the refunds due to the PAO for the excess charges collected by AT&T. This right is derived not only from the FCC's general statutory authority, and the authority specifically established by Section 276 and the orders issued pursuant thereto, but also as a direct result of AT&T's specific commitment to make such refunds. Moreover, neither considerations of *res judicata* nor the filed rate doctrine limit these absolute rights.

Not only does PAO have the law on its side, it is also right as a matter of simple justice. By overcharging PAO, and refusing to make refunds, AT&T not only derived substantial excess revenue in payphone line charges, thereby filling its coffers and economically crippling its competitors, it specifically and intentionally breached its commitment to the FCC voluntarily to act in a lawful manner and denied PAO the benefits to which it is lawfully entitled. Such conduct should not be rewarded.

Accordingly, PAO respectfully requests that the FCC issue declaratory ruling specifically establishing the rights of the members of the PAO to the refund of overcharges for amounts collected in excess of lawful payphone rates back through to April 15, 1997. To the extent deemed necessary by the FCC, PAO also seeks an order pre-empting the State of Ohio's refusal to implement the orders of the Commission in CC Docket 96-128, requiring the assessment of cost-based rates to payphone providers and the refund of charges in excess of such rates. Finally, PAO requests that the FCC order SBC-Ohio, immediately to disgorge and return all dial-around compensation collected pursuant to Section 276 and the FCC's rules and orders promulgated thereunder.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Silsa S. Cabezas, of the firm Technology Law Group, do hereby certify that true copies of the foregoing *Reply of the Payphone Association of Ohio to Comments Filed by Each of AT&T, Inc.'s and the Verizon Telephone Companies, and the Public Utilities Commission of Ohio* was, on this 20th day of February 2007, delivered by telecopy and by first-class mail postage prepaid to the following:

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Dated: February 20, 2007